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NO. 87 -

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

J. BURROUGHS, LIEUTENANT DIETRICK,
PASQUALE BARONE, CHARLES H. ZIMMERMAN,

Petitioners

v.

WILLIAM F. HIGGINS,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a prison security problem in fact must be shown before a reviewing court is permitted to accord substantial deference to corrections officials on a First Amendment challenge to a policy grounded upon security concerns?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petitioners, officials of the Pennsylvania Department of Corrections, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported but may be found in the appendix at 1a-32a. The opinion of the District Court (33a-43a) is not reported.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was issued on April 10, 1987. (App. 1a). This petition for writ of certiorari has been filed within ninety days of that date. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ....

U.S. Const. Amend. I.

STATUTE INVOLVED

The Civil Rights Act of 1871, c.21, §1, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1983.

STATEMENT OF THE CASE

Respondent Higgins, an inmate at the State Correctional Institution at Graterford, Pennsylvania, was prohibited by prison officials from carrying his rosary beads into the prison's visiting area. He brought this action pursuant to 42 U.S.C. §1983 against prison officials alleging that his First Amendment free exercise right had been violated. (App. 34a).

Higgins was prohibited from carrying his rosary beads into the visiting area because, in the opinion of the prison officials, it would jeopardize the prison's security, order and control. (App. 5a, 38a). Rosary beads can be used to hide contraband, such as a tablet or a pill in the holes of the beads, and the beads themselves can be replaced by a tablet or pill. (App. 12a, 13a, 38a).

Rosary beads also can be used as a weapon by wrapping them around someone's neck, slapping someone in the face or as an effective threat of force. (App. 14a, 38a).

Higgins sought only to carry his rosary beads into the prison visiting area. The carrying of rosary beads is not a central religious practice of the Roman Catholic faith; rosary beads are a prayer assistance, used by an individual in private, to count and sequence prayers. (App. 4a). Higgins is permitted to carry his rosary beads at any time in areas of the prison other than the visiting area. (App. 15a-16a, 26a-27a, 30a, 41a-42a). The visiting area has a greater potential for security, order and control problems than any other area in the prison because it is the only area that inmates have contact with visitors. (App. 39a).

The District Court, in granting the prison officials summary judgment, found that they had articulated valid security, control and order reasons why Higgins should not be permitted to carry his rosary beads into the prison's visiting area, and that they reasonably had accommodated Higgins' First Amendment right to free exercise of religion by permitting him to carry them in other places within the prison. (App. 41a-42a).

Higgins appealed the District Court's decision to the United States Court of Appeals for the Third Circuit. When the case was argued before a panel of that court, certiorari had been granted in Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986), reversed sub nom. O'Lone v. Estate of Shabazz, No. 85-1722 (June 9, 1987). Petitioners in Shabazz, officials of the New Jersey Department of Corrections, raised the issues of what standard

applies in reviewing inmates' free exercise of religion challenges to state prison regulations, and whether the Third Circuit Court of Appeals erred when it adopted what amounts to a "least restrictive alternative" approach.

The Court of Appeals decided this case after Shabazz had been argued before this Court on March 24, 1987. (App. 24a). The Court of Appeals' decision, over the dissent of Judge Higginbotham, held that the prison officials did not meet the standard announced in Shabazz of demonstrating that a bona fide security problem must have occurred, or is likely to arise, if the inmate is permitted to engage in the conduct prohibited by the prison rule. The court reasoned that the prison officials did not show how rosary beads "have ever been deemed to be

dangerous or regarded as a weapon" or "how contraband can be compressed into the area between the string and beads made of solid wood" (App. 15a-16a). The court reversed the entry of summary judgment for the prison officials.

In dissent, Judge Higginbotham stated that the court should not have decided this case since it presented a question under the standard of Shabazz, and the court was aware that Shabazz was argued before this Court on March 24, 1987. (App. 2a, 24á). Judge Higginbotham also found that the prison officials had articulated valid security considerations and had substantially accommodated Higgins' religious practice. He therefore would have deferred to the expert judgment of the prison officials that the challenged regulation was necessary to preserve institutional security. (App. 31a-32a).

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION ON THE STANDARD OF REVIEW OF FIRST AMENDMENT CHALLENGES TO PRISON REGULATIONS INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW AND CONFLICTS WITH DECISIONS OF THIS COURT.

The decision of the Court of Appeals, that the prison officals failed to demonstrate that a bona fide security problem was presented by an inmate's carrying his rosary beads into a prison visiting area, was issued pursuant to the standard of review announced in Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986). As acknowledged by the court below, however, certiorari was granted by this Court in O'Lone v. Shabazz, No. 85-1722, and the case was argued on March 24, 1987. Indeed, this Court now has reversed the Court of Appeals' decision in Shabazz. O'Lone v. Estate of Shabazz, No. 85-1722 (June 9, 1987). Rather than

await this Court's decision in O'Lone -- as suggested by the dissent -- the majority of the panel proceeded to apply its Shabazz standard and reverse the decision of the District Court. Because the application of this "newly minted standard for the accommodation of the religious rights of prisoners" (App. 6a) has been categorically rejected by this Court in O'Lone, the petition for writ of certiorari should be granted and the decision of the Court of Appeals should be reversed summarily.

Under the now-discredited standard in the Third Circuit, government officials had to "show that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which [the inmates'] religious rights can be accommodated

without creating bona fide security problems." Shabazz, supra, 782 F.2d at 420. The defending state officials, therefore, had the burden of establishing that their security concerns were based upon actual incidents of problems with the challenged policy. Id. at 419.

As this Court recently stated, however, such a standard ignored the Court's directions that prison officials must be permitted to anticipate and forestall threats to security before problems actually occur. O'Lone, supra at 6. See also Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 132-33 (1977); Whitley v. Albers, No. 84-1077 (March 4, 1986), Slip op. at 9. In O'Lone, the Court rejected the Third Circuit's standard and re-emphasized that prison regulations alleged to infringe inmates' constitutional rights are to be

judged under a "reasonableness" test which is less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights. Slip op. at 5. See also Jones, supra, 433 U.S. at 128.

> This approach ensures the ability of corrections officials "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration," and avoids unnecessary intrusion of the judiciary into problems particularly ill-suited to "resolution by decree".

O'Lone, supra at 6, citing Procunier v. Martinez, 416 U.S. 396, 405 (1974), Turner v. Safley, No. 85-1384 (June 1, 1987), and Bell v. Wolfish, 441 U.S. 520, 548 (1979).

That petitioners here could not point to an actual instance where rosary beads

created a problem in fact during a visit by an outsider does not diminish the bona fides of their belief that the potential for such a problem must be addressed by a prophylactic prison rule. The idea that an inquiry into past security problems is determinative seriously erodes the ability of prison administrators to anticipate problems and implement measures in advance of a breach of security. O'Lone, supra at 5-6.

Furthermore, the "Court of Appeals' decision in this case was wrong when it established a separate burden on prison officials to prove 'that no reasonable method exists by which prisoners' religious rights can be accommodated without creating bona fide security problems.'" O'Lone, supra at 6. While not expressly resolving the accommodation issue, the Court of Appeals expressed

"grave reservations about the state's purported accommodation of Higgins' practice." (App. 21a). The District Court, however, expressly found that respondent "has been afforded reasonable methods of accommodation since it has been established that he can carry his rosary beads through the prison, except in the visiting area." (App. 41a-42a). Under O'Lone, the District Court's finding amply supports reversal of the Court of Appeals' decision.

Given that, "by definition" prisons are "places of involuntary confinement of persons who have a demonstrated proclivity for anti-social, criminal, and often violent conduct," Hudson v. Palmer, 468 U.S. 517, 526 (1984), there is an "ever-present potential for conflict...." Jones, supra, 433 U.S. at 132. Reasonably-tailored rules designed

to anticipate and prevent breaches of security in areas of a prison where civilians are present cannot be tested by a standard that requires an actual incident to have occurred before they will be upheld. This Court's decisions as well as effective corrections administration require reversal of the Court of Appeals' standard in this case.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted and, upon review, the decision of the Court of Appeals should be reversed summarily.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1162

WILLIAM F. HIGGINS,
Appellant

v.

J. BURROUGHS; LIEUTENANT DIETRICH;
PASQUALE BARON;
and
CHARLES H. ZIMMERMAN

On Appeal from the United States
District Court for the Eastern
District of Pennsylvania
(D.C. No. 85-3655)

Argued October 27, 1986

BEFORE: ADAMS, HIGGINBOTHAM, and
GARTH, Circuit Judges

Reargued March 3, 1987

BEFORE: GIBBONS, Chief Judge
and HIGGINBOTHAM and GARTH
CIRCUIT JUDGES

(Opinion filed April 10, 1987)

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OPINION OF THE COURT

GARTH, Circuit Judge:

This appeal presents the question as to whether under the standard announced in Shabazz v. O'Lone[1], a state prison's

---

[1]Shabazz v. O'Lone, 782 F.2d 416 (3d Cir.) (in banc) (Hunter, J. and Garth, J., dissenting), cert. granted, 54 U.S.L.W. 3247, 3257 (U.S. Oct. 14, 1986) (No. 85-1722).

This case originally was heard on October 27, 1986. Thereafter, Judge Adams, a member of the panel, resigned from the court. An order of rehearing was issued on February 2, 1987.

regulations which prohibit a prisoner from carrying his rosary beads into the prison visiting area may be sustained. The district court held the regulation valid. We reverse.

I.

William Higgins, a fifty-six year old prisoner serving a long-term sentence for homicide at the State Correctional Institute at Graterford (SCIG), is an observant Catholic who has been carrying rosary beads in his pockets at all times since his teen years, and who believes that he should carry them at all times, including during his term in prison. App. at 64-66. Higgins attended Catholic schools, and he often attends religious services at the prison. Higgins has been carrying rosary beads in his

pockets since he first was incarcerated, in 1977. Neither the sincerity of Higgins' beliefs, nor his religious attachment to rosary beads, which are used by practicing Catholics to properly count and sequence prayers, is in dispute.

Higgins states that until June 3, 1985, he carried beads into all areas of the prison, including the visiting area, without difficulty. In October 1984, however, SCIG provided inmates with new trousers to be worn only in the visiting area. These trousers had no pockets into which Higgins could place his beads; he therefore resorted to carrying them in his hands. From October, 1984 until June 3, 1985, Higgins asserts, he carried the beads without incident into the visiting area, in his hands.

When he tried to carry his rosary beads into the vising area on June 3, 1985, however, he was forbidden from doing so by the first-time enforcement of a standing rule which only permitted "wedding ring, glasses and approved medal[s]" to be brought into the visiting areas. App. at 171. Religious medals, the prison regulations state, are to be "worn", not carried; and they cannot exceed the size of a 50-cent piece. Id.

Deprived of the ability to keep the beads with him in the visiting area Higgins filed a pro se complaint, which protested the infringement of his first amendment rights. SCIG defended its practice by alleging that security considerations dictated the prohibition. SCIG supported this claim by submitting to the court the opinions of two officials from the prison. Based

on the facts SCIG presented, the district court granted summary judgment in favor of SCIG and against Higgins.

The district court's opinion purportedly measured the evidence presented by SCIG against the newly minted standard for the accommodation of the religious rights of prisoners set forth in Shabazz v. O'Lone, 782 F.2d 416 (3d Cir.) (in banc), cert. granted, 54 U.S.L.W. 3247, 3257 (U.S. Oct. 14, 1986) (No. 85-1722). It concluded that the record supports SCIG's position that the regulations serve security goals and accommodate prisoners' religious rights. Contrary to the district court, we hold that the Shabazz standard was not met in this case.

II.

In Shabazz, minimum security Muslim prisoners discovered that as a result of new prison security regulations designed to help deal with overcrowding at the prison, some prisoners were denied the right to return from work details at varying distances from the main prison to attend "Jumu'ah," a weekly communal religious service. The prison introduced credible evidence, through experts and experienced prison officials, which indicated that the practice of sending out details of guards to accompany prisoners back from work entailed (1) severe inefficiencies and logistical problems in the allocation of prison resources, with attendant security risks, when guards were detached from normal duties at a

period when the prison was seriously overcrowded; and (2) serious rehabilitation goals which would be jeopardized by any of the various alternatives that might be mandated by efforts at "mutual accommodation". Evidence also indicated that many of the requests by prisoners to attend services were made by persons who were insincere in their religious beliefs and who wished only to avoid outside work details. 782 F.2d at 426-29.

The court in Shabazz remanded the proceeding for another hearing after promulgating a new standard designed to accommodate the religious rights of prisoners. It did so because under the earlier standard announced in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980), a mere declaration by prison officials "that certain religious practices raise

potential security concerns [was] sufficient to override a prisoner's first amendment right..." Id.

Creating a new, two-part test, the Shabazz court demanded that the State prove "[1] that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and [2] that no reasonable method exists by which appellants' religious rights can be accommodated without creating bona fide security problems." 782 F.2d at 420. Shabazz criticized the older St. Claire standard for failing to place on the state a "burden of showing that bona fide security problems occurred or are likely to arise because of the religious practice at issue." Id. at 419 (emphasis added).

Thus, at least two major differences emerged between the older St. Claire standard and the recently adopted Shabazz standard. One difference emphasized the state's burden of demonstrating that a bona fide security problem existed or was likely to arise. The second difference emphasized that whatever deference must be given to decisions by prison officials in areas concerning prison security, when first amendment values are implicated this deference must be tempered to accommodate free exercise values.

We turn now to the record which SCIG claims meets the tests set by this standard.

III.

A.

In full, the record pertaining to prison security concerns, consists of no more than a two-page affidavit and two pages of dialogue in a deposition of longer length. App. at 12-13, 206-08, 222. Major William Winder, a guard at SCIG, asserted:

> Rosary beads do not fall within SCIG's visiting area regulations' definition of approved medal. Rosary beads could be used in the visiting area as a weapon or to hide contraband which would jeopardize the security at SCIG [Graterford].

App. at 13.

The other expression of concern about security was provided in response to questions that were asked of Officer Donald Vaughn, now the Deputy Superintendent for Operations at SCIG. Officer Vaughn touched on the two problems that Winder had alluded to: (1) weapons and (2) contraband. He stated that it was possible for him to envision circumstances in which the rosary beads at issue in this case could conceivably be used to hide contraband:

> A: You would be surprised, and I don't want to get into war stories with you, but over my tenure I have found several things that most people take, normal everyday items that are used that could be turned around in prison and used for other things.

Q: ...[W]hat could be put inside these beads, what could be hidden. Do you understand what I am saying?

A: The beads themselves could be altered and it could be the form of a tablet or pill or anything.

Q: Could you put a weapon in them?

A: No, you couldn't put a weapon in them.

Later, Vaughn expanded on his theory that drugs might be smuggled to prisoners inside the beads. Friends or relatives, he suggested, might smuggle drugs to a prisoner using the holds through which the beads are strung:

A: ... Most people would think that you couldn't hide contraband under a stamp, and we have found things hidden under a stamp. If I was to really take this and give it to my security officer he would come up with all different types of ways, because of the fact you would be surprised how some things, very small items are tried to be smuggled in by visitors, relatives and friends that make a person high. So I wouldn't put anything past anybody from trying to put something in the holes.

App. at 222.

Vaughn also provided a scenario to explain how the rosary beads could become weapons:

> Q: Tell me how these beads could be used as a weapon, please.
>
> A: You can take these and wrap them around someone's neck, even though they broke before you could do anything, even a female, and sometimes females are more fragile than a male. And we have had several incidents in the visiting room where inmates have attacked their female visitors, whether they are pregnant, mothers, sisters, girlfriends, whatever.
>
> Q: [interrupted]
>
> A: We are talking about various different types [of beads]. As I told you, these would probably break, but there are various different types of rosary beads.

App. at 208 (emphasis added).

The above excerpts from the record constitute the only evidence substantiating SCIG's fear that hand-carried rosary beads present a threat to security.

BEST AV

B.

Our reading of the record does not establish that rosary beads are dangerous, or that they present a security risk. The record does not indicate that a string of rosary beads held in a hand is any more dangerous than the prisoner's open hand, which at least arguably could be used to choke a victim or to "palm" a pill smuggled from the outside. Even more significantly, no suggestion has ever been made that rosary beads, which the evidence reveals have been and are consistently permitted to be carried in the general prison population, have ever been deemed to be dangerous or regarded as a weapon. If rosary beads are weapons, as SCIG now contends, then it is difficult to understand why "weapons" such as these

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are routinely permitted throughout the prison. Appellee's brief at 13.

Nor does the record explain how contraband can be compressed into the area between the string and beads made of solid wood. The most that can be gleaned from the record is that any legitimate concern which a prison may have with respect to hollowed-out rosary beads which might be considered as a possible receptacle for contraband -- could be readily accommodated by the same type of inspection which takes place with respect to religious medallions which the regulations already permit in the visiting area. App. at 226.

Not only is there no proof in the record to affirmatively establish a legitimate security concern about rosary beads used either as a weapon or to hide contraband, but the evidence points to a

BEST A

contrary conclusion. Officer Vaughn himself conceded that rosary beads would break apart in any attempt to use them as a weapon. App. at 206-208. And he admitted that never, to his knowledge, had rosary beads or even necklaces been used to smuggle items into or out of the prison. His only qualification was as follows:

> Q: Have you had security problems relating to people wearing religious metals [sic] around their neck?
>
> A: We have had several attempts for inmates to try to bring back different types of chains that they hadn't worn into the visiting room. And vice versa, inmates trying to give the chains to their loved ones.

App. at 226. He admitted that neck chains to which religious medals are attached are at least as useful as weapons (for purposes of strangulation) as rosary beads (assuming that rosary

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beads were strong enough to hold together), but acknowledged that neck chains are not prohibited in the visiting area while beads are. App. at 117. He further stated that he could "see no problems with the beads as they lie before me, recognizing what they are, as a praying system, not to be worn, but to be carried." App. at 113.

C.

Moreover, the record establishes that the regulations as they may be applied to the hand-carrying of rosary beads were never intended to serve security goals. Officer Vaughn testified on deposition that the regulation were promulgated to place strict, arbitrary limits on the material possessions that a prisoner could bring with him to the visiting area:

BEST AV

Q: ... is there anything specific about carrying these in the pocket that constitutes a greater threat than what is currently allowed, which is, as I think you have told me, the necklace worn around the neck with a medallion [which is allowed]?

A: Only because we do not allow inmates to carry anything in the visiting room except a wedding band and a religious medallion.

Q: Why not?

A: That's the rule.

Q: Why?

A: Controlling purposes.

Q: Why?

A: If you give them a rosary, next week it will be a wallet, the next week it will be an ink pad.

App. at 119-20.

Officer Vaughn also testified that the decision to prohibit hand-carried beads grew out of his personal feeling, based on consultation with priests, that rosary beads were not essential ["needed"] in a visiting room:

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EDITOR'S NOTE

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> If I felt that this is something that a person would need in the visiting room when he is visiting with his people, I would say yes, I have no problem with it. But at this time I view it as contraband in the visiting room due to the fact that it is not allowed, and I have information from priests who ...I have consulted with, that this is something that is not needed.

App. at 145 (emphasis added).

In summary, based on this record, the risk of using hand-carried rosary beads either as a weapon or for purposes of concealing contraband has not been established. Thus, unlike the district court, we conclude that the threshold requirement of the Shabazz standard has not been met, because no bona fide security risk occurred or is likely to arise because of the religious practice at issue. Shabazz, 782 F.2d at 714.

IV.

Because SCIG has not demonstrated a "bona fide security problem", we have no need to address the accommodation standard of Shabazz, which would require proof that SCIG has made reasonable efforts to accommodate both Higgins' religious practices and SCIG's security concerns. SCIG having failed to prove any bona fide security concern, no need exists to "accommodate" Higgins' religious practice of carrying rosary beads into the visiting area.

Thus, while we have grave reservations about the state's purported accommodation of Higgins' practice -- particularly in light of Officer Vaughn's testimony that all that would

be required would be to order the next "batch of pants" with a pocket -- App. at 122-23,[2] we find no reason to prolong our discussion with an analysis of free exercise accommodation.

---

[2]Officer Vaughn testified that the solution to the Higgins problem was obvious and not particularly taxing:

> Q: If Mr. Higgins is allowed to carry his rosaries in his pants pocket in the visiting room, how will you respond to that so as to maintain maximum order, security and control?
>
> A: I would probably have to order my next batch of pants with a pocket.
>
> Q: Anything else?
>
> A: There wouldn't be anything else necessary....

V.

Because SCIG has not carried its requisite burden of demonstrating that a bona fide security problem has occurred or is likely to arise because Higgins hand-carried his rosary beads into the visiting area, we will reverse the judgment of the district court and remand for further proceedings consistent with the foregoing opinion.

A. LEON HIGGINBOTHAM, JR., Circuit Judge, dissenting.

When we heard reargument in this case on March 3, 1987, certiorari had been granted in Shabazz v. O'Lone, 782 F.2d 416 (3d Cir.) (in banc) (Hunter, J., joined by Garth, J., dissenting), cert. granted, ____ U.S. ____, 107 S.Ct.

268 (1986) (No. 85-1722). Since then, Shabazz has been argued before the United States Supreme Court. See 55 U.S.L.W. 3616 (U.S. Mar. 24, 1987). I think that we should not decide this matter now, since -- as the majority admits -- "this appeal presents a question ... under the standard announced in Shabazz". Maj. typescript at 2. However, if we are to predicate an opinion on the Shabazz standard, I respectfully dissent from the conclusion that "the record does not establish that rosary beads ... present a security risk." Id. at 8.

This appeal is from a grant of summary judgment. If the majority were merely remanding this matter for a full evidentiary hearing, I would not dissent. But the majority is making findings on what are, at a minimum,

disputed and genuine issues of material fact. While there was probably an absence of disputed material facts sufficient to warrant the entry of summary judgment for the State, there is certainly -- even reading the record in what the majority considers the light most favorable to Higgins -- enough of a dispute to require some further evidentiary hearing on the contraband issue. Given even the majority's view of the facts, in other words, the matter should be remanded to the district court for further findings on a full evidentiary record.

I.

The record in this case establishes that rosary beads typically consist of a string up to two feet long, with wooden beads of varying sizes and an attached

wooden cross of approximately one to three inches in length. Included in the officials' reasons for refusing to allow Higgins to bring his rosary beads with him into the visiting room was the danger that, holled out, the beads could be used to smuggle contraband such as drugs from the visiting area back into the prison. App. at 206-207. Inspecting the beads upon entering and exiting the visiting room, the State maintains, would be both an impracticable and unreasonable burden to place upon its prison guards. Brief for Appellees at 3. The district court agreed that prison officials should not be required to accommodate Higgins' claimed free exercise interest in carrying his rosary beads <u>at all times</u>. "It would be impracticable, unreasonable and too time-consuming to have prison

security dismantle and inspect upwards of fifty individual beads contained in the rosary each time the prisoner enters and exists the visiting room". Higgins v. Burroughs, No. 85-3655, mem. op. at 5 (E.D. Pa. Feb. 26, 1986).

As Higgins points out, statements by prison officials indicate that accommodation of his claim is possible but, from their perspective, undesirable. For example, in his deposition Deputy Vaughn acknowledged that "[i]f I felt that [the rosary] is something that a person would need in the visiting room when he is visiting with his people, I would say yes, I have no problem with it." App. at 145. Higgins also stresses that Deputy Vaughn testified that he would merely order the next batch of prison pants with pockets if a court ordered that Higgins be

allowed to carry his rosary into the visiting area. Id. at 123. From these two statements, Higgins concludes that permitting him to carry his beads into the visiting area "would require no greater measures for the order, security and control at Graterford than what already exists." Brief for Appellant at 6. Higgins contends that, because officials have conceded that accommodation is possible, the first amendment mandates that he be allowed to carry the rosary into the visiting area.

II.

The minimum security plaintiffs in Shabazz were denied all access to the central religious service of their faith even though inmates who were classified

as greater security risks were allowed to attend the weekly Jumu'ah service. In such a situation, we held, officials should be required to show that accommodation would pose a genuine security problem. Shabazz thus articulated a balancing test, which weighs the degree of infringement of a free exercise interest against the degree of risk posed by accommodation, and places the burden on prison officials to demonstrate that no reasonable accommodation exists. We remanded Shabazz so that the district court could determine through additional fact-finding whether the prisoners' free exercise interest reasonably could be accommodated by prison officials without creating an undue security risk. Shabazz, 782 F.2d at 420. We did not decide that accommodation was

constitutionally mandatory. Shabazz held only that security considerations and the feasibility of accommodation must be weighted against the claimed infringement of free exercise rights. Id.

Prision officials already have accommodated Higgins's religious beliefs to a significant degree. He is permitted to carry his rosary beads throughout the prison, and only during the few hours he spends in the visiting area -- some three or four times per year -- is he forbidden to carry the beads. This amounts to less than ten out of approximately 8,760 hours per year.

The State's security concerns focus on the dangers of contraband storage. Deputy Vaughn testified that "the beads themselves could be altered and it could

be the form of a tablet or pill or anything." App. at 207. He further testified that "we have found things hidden under stamps.... [Y]ou would be surprised how some things, very small items are tried to be smuggled in .... I wouldn't put anything past anybody from trying to put something in the holes.' Id. at 222. I am persuaded that, even if the district court improperly concluded that summary judgment for the State was warranted, whether this contraband risk outweighs Higgins's free exercise right should be reconsidered by the district court, assisted by further findings.

III.

Because Higgins's religious beliefs already have been substantially accommodated, and because valid security

considerations appear to militate against creating this cumbersome exception to the State's visiting area regulations, I decline to intrude into the province of the state penological system on the record before us at this time. For the foregoing reasons, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

WILLIAM F. HIGGINS	:	CIVIL ACTION
v.	:	
J. BURROUGHS, et al	:	NO. 85-3655

MEMORANDUM OPINION AND ORDER

WEINER, J. February 26, 1986

Plaintiff, a prisoner incarcerated at the State Correctional Institution at Graterford (SCIG), brought this civil rights action against defendants alleging a violation of his Constitutional rights. Presently before the court are cross-motions for summary judgment. For the reasons which follow, plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted.

Plaintiff claims that his First Amendment right to exercise his religion was abridged when defendant prison officials prohibited him from carrying his rosary beads into SCIG's visiting room. Plaintiff claims violation of his rights under 42 U.S.C. §1983.

To prevail upon a motion for summary judgment the moving party must conclusively demonstrate to the court's satisfaction that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law, Fed.R.Civ.P. 56(c); Wolk v. Saks Fifth Avenue, Inc., 728 F.2d 221, 224 (3d Cir. 1984); Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983). We must view all disputed facts in the light most favorable to the party opposing the motion. EEOC v. Great Atlantic & Pacific Tea Co., 735 F.2d 69,

81 (3d Cir. 1984); Small v. Seldows Stationery, 617 F.2d 992, 994 (3d Cir. 1980). There are no disputes as to material facts.

An action under 42 U.S.C. §1983 requires (1) the conduct complained of must be committed by a person acting under color of state law, and (2) it must have deprived the plaintiff of a right or privilege secured by the Constitution or the laws of the United States. Parrat v. Taylor, 451 U.S. 527, 535 (1981); Riley v. Jeffes, 777 F.2d 143, 145 (3d Cir. 1985). The federal courts have a delicate role in the complex matters pertaining to the administration, control, and operation by the states of their penal systems and their prisons, an area traditionally within their domain. Riley at 145. Federal courts have consistently held

that restrictions on a prisoner's constitutional rights must be evaluated in terms of the legitimate goals and policies of the penological institution. Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoner's Labor Union, 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974); St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980). "Convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." Bell at 545. Nevertheless, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Id. at 545-46. Thus, "even when an institutional restriction infringes a specific constitutional guarantee... the

practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." Id. at 547. "Prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Id. at 547. "[J]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." Id. at 548.

In the case sub judice, it is the policy of SCIG to only allow inmates to wear wedding bands, glasses and approved religious medals in the visiting area in order to maintain order, security and control. The Bureau of Corrections Administrative Directive 819 and the Inmate Handbook define an approved medal as a religious medal worn by the inmate which does not exceed the size of a fifty cent piece. Defendant claims that the rosary beads could be used to hide contraband such as a tablet or a pill. Defendant also argues that the rosary beads can be used as a weapon by wrapping them around someone's neck in the visiting area. Prison guards would be burdened with the difficulty of (1) determining what artifacts are truly rosary beads and (2) maintaining surveillance over a variety of sized and

shaped rosary beads to ensure that they are not being used for illicit purposes.

Most important, a prison's visiting area has the potential for most security, order and control problems than any other area in the prison, by the very nature of the fact that inmates have outside contact with visitors in the visiting area. Only through uniform enforcement of the visiting area regulations can SCIG maintain order and control.

The plaintiff is not barred from seeking declaratory relief, however, as the standard articulated by the United States Court of Appeals for the Third Circuit is that the burden of proof lies with the prison officials to show that the inmate's exercise of his First Amendment rights could create a

potential threat to either the prison's order, security or control. St. Claire v. Cuyler, 634 F.2d at 114. The Court of Appeals has since modified St. Claire in -Shabazz v. O'Lone, (3d Cir., No. 84-5772) (filed January 27, 1986). In Shabazz, plaintiffs were deprived of attending Jumu'ah, a religious service which is held only on Fridays at noon. The correctional policy effectively banned the inmates' once a week opportunity to attend the service. The Court of Appeals held that when an inmate challenges, in a civil rights action, certain prison regulations as violative of his amendment rights, "the state must show that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which appellant's

religious rights can be accommodated without creating bona fide security problems." Shabazz, slip op. at 9.

The case sub judice is distinguishable from Shabazz in that this plaintiff can carry his rosary beads anywhere in the prison, except the visiting area. His religious exercise of carrying the rosary beads has not been totally banned as was the case in Shabazz. Even if the ruling in Shabazz is applicable to this case, all that is needed is "reasonable methods of accommodation... without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights." Shabazz, slip op. at 10.

Plaintiff has been afforded reasonable methods of accommodation since it has been established that he

can carry his rosary beads through the prison, except in the visiting area. It would be impracticable, unreasonable and too time-consuming to have prison security dismantle and inspect upwards of fifty individual beads contained in the rosary each time the prisoner enters and exists the visiting room.

The defendants have articulated valid security, control and order reasons why plaintiff should not carry his rosary beads into the visiting area of the prison, and have reasonably accommodated his First Amendment rights by allowing him to carry them everywhere else. He could also wear them around his neck or on his person as all other inmates are allowed to do regarding the various types of religious and other medals and chains that they wear.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

WILLIAM F. HIGGINS	:	CIVIL ACTION
v.	:	
J. BURROUGHS, et al	:	NO. 85-3655

ORDER

FEBRUARY 26, 1986

The motion of the plaintiff for summary judgment is DENIED.

The motion of the defendant for summary judgment is GRANTED.

Judgment is entered in favor of the defendant and against the plaintiff.

IT IS SO ORDERED.

Charles R. Weiner

Supreme Court, U.S.
FILED
JUL 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

J. BURROUGHS, LIEUTENANT DIETRICK, PASQUALE BARONE, CHARLES H. ZIMMERMAN,
Petitioners

v.

WILLIAM F. HIGGINS,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a prisoner may be properly denied free religious exercise where the state has been held to have no bona fide security interest in prohibiting such exercise?

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OPINIONS BELOW

The opinion of the Court of Appeals has not been reported, but may be found in the appendix at 1a-32a. The opinion of the District Court is not reported, but may be found in the appendix at 33a-43a.

STATEMENT OF THE CASE

William Higgins, a fifty-six year old prisoner at the State Correctional Institute at Graterford, Pennsylvania (SCIG), is an observant Catholic who has been carrying rosary beads in his pants pocket at all times since his teen years, and believes that he should carry them at all times, including during his term in prison. (App. 3a). Higgins attended Catholic schools, and he often attends religious services at the prison. Higgins has been carrying rosary beads in his pocket since he was first incarcerated in 1977. Neither the sincerity of Higgins' beliefs, nor his religious attachment to the rosary beads, which are used by practicing Catholics to properly count and sequence prayers, is in dispute. (App. 3a-4a).

Until June 3, 1985, Higgins carried rosary beads into all areas of the prison, including the visiting area, without objection by prison officials. In October, 1984, however, SCIG provided inmates with new trousers to be worn only in the visiting area. These trousers had no pockets into which he could place his beads; he therefore sought to carry them in his hands. From October of 1984 until June 3, 1985, Higgins carried the beads without incident into the visiting area in his hands. (App. 4a).

When Higgins tried to carry his rosary beads into the visiting area on June 3, 1985, however, he was forbidden from doing so by the first-time enforcement of a longstanding rule which only permitted "wedding rings, glasses, and approved medal[s]" to be brought into the visiting areas. (App. 5a). According to the prison regulations, religious medals are to be worn and not carried and they cannot exceed the size of a fifty cent piece. (App. 5a).

Deprived of the ability to exercise his religious practice of keeping the beads with him in the visiting area, Higgins filed a pro se complaint. SCIG defended its practice by alleging that security considerations dictated

the prohibition. The District Court granted summary judgment in favor of SCIG and against Higgins (App. 5a-6a).

The Court of Appeals reversed, holding that the State had no bona fide security interest in preventing Higgins' religious practice of carrying rosary beads with him into the visiting area (App. 21a).

The State had argued that rosary beads could be used as a weapon or to hide contraband which would jeopardize the security of SCIG (App. 11a-14a). The State continues to make this argument, even in its Petition for Writ of Certiorari (Brief of Petitioners 6-7).

However, the Court of Appeals held that the record does not establish that rosary beads present any security risk. The Court noted that there was absolutely no evidence that Higgins' practice of holding the rosary beads in his open hand was any more dangerous than a prisoner's open hand without rosary beads (App. 15a). It was further held that there was no evidence that rosary beads have ever been considered dangerous; no evidence that they could in fact be used to hide contraband; and no evidence that they would do anything but break apart if attempted to be used as a weapon (App. 15a-17a).

Significantly, it was admitted that the decision to prohibit Higgins from carrying the rosary beads in his hand grew out of the personal feelings of the Deputy Superintendent at SCIG, based on consultations with priests, that rosary beads were not essential to religious practice. The Deputy Superintendent testified:

> [i]f I felt that this is something that a person would need in the visiting room when he is visiting with his people, I would say yes, I have no problem with it. But at this time I view it as contraband in the visiting room due to the fact that it is not allowed,

> and I have information from priests who . . . I have consulted with, that this is something that is not needed.

(App. at 19a-20a). For these reasons, the Court of Appeals reversed the entry of Summary Judgment for the prison officials.

ARGUMENT

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

The basis for the Petition for Writ of Certiorari is that this Court's recent decision in *O'Lone vs. Estate of Shabazz*, ____ U.S. ____, 55 U.S.L.W. 4792 (1987) requires reversal of the Court of Appeals' decision in this case. The Court of Appeals in *Shabazz* held that the State must prove "[1] that the challenged regulations were intended to serve and do serve, the important penological goal of security, and [2] that no reasonable method exists by which appellants' religious rights can be accommodated without creating bona fide security problems." *Shabazz vs. O'Lone*, 782 F.2d 416, 420 (3d Cir. 1986), *rev'd sub nom. O'Lone vs. Estate of Shabazz, supra*. However, the Supreme Court in *O'Lone* held only that the "Court of Appeals decision in this case was wrong when it established a separate burden on prison officials to prove 'that no reasonable method exists by which [prisoners'] religious rights can be accommodated without creating bona fide security problems'." *O'Lone*, 55 U.S.L.W. at 4794. In this case, the Court of Appeals never reached the second, now discredited, standard of requiring the State to prove that no reasonable method exists by which the prisoners' religious rights can be accommodated without creating bona fide security problems. Rather, the Court of Appeals held that

> because SCIG has not demonstrated a "bona fide security problem," we have no need to address the accommodation standard of *Shabazz*, which would require proof that SCIG has made reasonable efforts to accommodate both Higgins' religious practices and SCIG's security concerns. SCIG having failed to prove any bona fide security concerns, no need exists to "accommodate" Higgins' religious practice of carrying rosary beads into the visiting area.

This Court held in *O'Lone* that in order for the policy challenged to pass muster, "the regulation must have a logical connection to legitimate governmental interests invoked to justify it." *O'Lone*, *supra* at 4794. This language is virtually identical to the Court of Appeals' initial standard that the State must prove "that the challenged regulations were intended to serve and do serve, the important penological goal of security." *Shabazz*, *supra at* 420. It was this standard, unaltered by the Supreme Court in *O'Lone*, that the Court of Appeals held to be failed by the State. Plainly, as SCIG can establish no bona fide security problem, there can be no logical connection between the regulation and any legitimate govermental interests.

Therefore, the Court of Appeals' decision is consistent with the findings of this Court.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BEASLEY, HEWSON, CASEY, COLLERAN, ERBSTEIN & THISTLE

BY:_____

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CERTIFICATE OF SERVICE

I, Thomas R. Kline, Esq., hereby certify that on July 21, 1987, the counsel listed below was served by First Class Mail, postage prepaid with true and correct copies of Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third District.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1162

~~WILLIAM F. HIGGINS~~,
Appellant

v.

J. BURROUGHS; LIEUTENANT DIETRICH;
PASQUALE BARON;
and
CHARLES H. ZIMMERMAN

On Appeal from the United States
District Court for the Eastern
District of Pennsylvania
(D.C. No. 85-3655)

Argued October 27, 1986

BEFORE: ADAMS, HIGGINBOTHAM, and
GARTH, Circuit Judges

Reargued March 3, 1987

BEFORE: GIBBONS, Chief Judge
and HIGGINBOTHAM and GARTH
CIRCUIT JUDGES

(Opinion filed April 10, 1987)

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OPINION OF THE COURT

GARTH, Circuit Judge:

This appeal presents the question as to whether under the standard announced in Shabazz v. O'Lone[1], a state prison's

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[1]Shabazz v. O'Lone, 782 F.2d 416 (3d Cir.) (in banc) (Hunter, J. and Garth, J., dissenting), cert. granted, 54 U.S.L.W. 3247, 3257 (U.S. Oct. 14, 1986) (No. 85-1722).

This case originally was heard on October 27, 1986. Thereafter, Judge Adams, a member of the panel, resigned from the court. An order of rehearing was issued on February 2, 1987.

regulations which prohibit a prisoner from carrying his rosary beads into the prison visiting area may be sustained. The district court held the regulation valid. We reverse.

I.

William Higgins, a fifty-six year old prisoner serving a long-term sentence for homicide at the State Correctional Institute at Graterford (SCIG), is an observant Catholic who has been carrying rosary beads in his pockets at all times since his teen years, and who believes that he should carry them at all times, including during his term in prison. App. at 64-66. Higgins attended Catholic schools, and he often attends religious services at the prison. Higgins has been carrying rosary beads in his

pockets since he first was incarcerated, in 1977. Neither the sincerity of Higgins' beliefs, nor his religious attachment to rosary beads, which are used by practicing Catholics to properly count and sequence prayers, is in dispute.

Higgins states that until June 3, 1985, he carried beads into all areas of the prison, including the visiting area, without difficulty. In October 1984, however, SCIG provided inmates with new trousers to be worn only in the visiting area. These trousers had no pockets into which Higgins could place his beads; he therefore resorted to carrying them in his hands. From October, 1984 until June 3, 1985, Higgins asserts, he carried the beads without incident into the visiting area, in his hands.

When he tried to carry his rosary beads into the vising area on June 3, 1985, however, he was forbidden from doing so by the first-time enforcement of a standing rule which only permitted "wedding ring, glasses and approved medal[s]" to be brought into the visiting areas. App. at 171. Religious medals, the prison regulations state, are to be "worn", not carried; and they cannot exceed the size of a 50-cent piece. Id.

Deprived of the ability to keep the beads with him in the visiting area Higgins filed a pro se complaint, which protested the infringement of his first amendment rights. SCIG defended its practice by alleging that security considerations dictated the prohibition. SCIG supported this claim by submitting to the court the opinions of two officials from the prison. Based

on the facts SCIG presented, the district court granted summary judgment in favor of SCIG and against Higgins.

The district court's opinion purportedly measured the evidence presented by SCIG against the newly minted standard for the accommodation of the religious rights of prisoners set forth in Shabazz v. O'Lone, 782 F.2d 416 (3d Cir.) (in banc), cert. granted, 54 U.S.L.W. 3247, 3257 (U.S. Oct. 14, 1986) (No. 85-1722). It concluded that the record supports SCIG's position that the regulations serve security goals and accommodate prisoners' religious rights. Contrary to the district court, we hold that the Shabazz standard was not met in this case.

In Shabazz, minimum security Muslim prisoners discovered that as a result of new prison security regulations designed to help deal with overcrowding at the prison, some prisoners were denied the right to return from work details at varying distances from the main prison to attend "Jumu'ah," a weekly communal religious service. The prison introduced credible evidence, through experts and experienced prison officials, which indicated that the practice of sending out details of guards to accompany prisoners back from work entailed (1) severe inefficiencies and logistical problems in the allocation of prison resources, with attendant security risks, when guards were detached from normal duties at a

period when the prison was seriously overcrowded; and (2) serious rehabilitation goals which would be jeopardized by any of the various alternatives that might be mandated by efforts at "mutual accommodation". Evidence also indicated that many of the requests by prisoners to attend services were made by persons who were insincere in their religious beliefs and who wished only to avoid outside work details. 782 F.2d at 426-29.

The court in Shabazz remanded the proceeding for another hearing after promulgating a new standard designed to accommodate the religious rights of prisoners. It did so because under the earlier standard announced in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980), a mere declaration by prison officials "that certain religious practices raise

potential security concerns [was] sufficient to override a prisoner's first amendment right..." Id.

Creating a new, two-part test, the Shabazz court demanded that the State prove "[1] that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and [2] that no reasonable method exists by which appellants' religious rights can be accommodated without creating bona fide security problems." 782 F.2d at 420. Shabazz criticized the older St. Claire standard for failing to place on the state a "burden of showing that bona fide security problems occurred or are likely to arise because of the religious practice at issue." Id. at 419 (emphasis added).

Thus, at least two major differences emerged between the older St. Claire standard and the recently adopted Shabazz standard. One difference emphasized the state's burden of demonstrating that a bona fide security problem existed or was likely to arise. The second difference emphasized that whatever deference must be given to decisions by prison officials in areas concerning prison security, when first amendment values are implicated this deference must be tempered to accommodate free exercise values.

We turn now to the record which SCIG claims meets the tests set by this standard.

III.

A.

In full, the record pertaining to prison security concerns, consists of no more than a two-page affidavit and two pages of dialogue in a deposition of longer length. App. at 12-13, 206-08, 222. Major William Winder, a guard at SCIG, asserted:

> Rosary beads do not fall within SCIG's visiting area regulations' definition of approved medal. Rosary beads could be used in the visiting area as a weapon or to hide contraband which would jeopardize the security at SCIG [Graterford].

App. at 13.

The other expression of concern about security was provided in response to questions that were asked of Officer Donald Vaughn, now the Deputy Superintendent for Operations at SCIG. Officer Vaughn touched on the two problems that Winder had alluded to: (1) weapons and (2) contraband. He stated that it was possible for him to envision circumstances in which the rosary beads at issue in this case could conceivably be used to hide contraband:

> A: You would be surprised, and I don't want to get into war stories with you, but over my tenure I have found several things that most people take, normal everyday items that are used that could be turned around in prison and used for other things.

Q: ...[W]hat could be put inside these beads, what could be hidden. Do you understand what I am saying?

A: The beads themselves could be altered and it could be the form of a tablet or pill or anything.

Q: Could you put a weapon in them?

A: No, you couldn't put a weapon in them.

Later, Vaughn expanded on his theory that drugs might be smuggled to prisoners inside the beads. Friends or relatives, he suggested, might smuggle drugs to a prisoner using the holds through which the beads are strung:

A: ... Most people would think that you couldn't hide contraband under a stamp, and we have found things hidden under a stamp. If I was to really take this and give it to my security officer he would come up with all different types of ways, because of the fact you would be surprised how some things, very small items are tried to be smuggled in by visitors, relatives and friends that make a person high. So I wouldn't put anything past anybody from trying to put something in the holes.

App. at 222.

Vaughn also provided a scenario to explain how the rosary beads could become weapons:

> Q: Tell me how these beads could be used as a weapon, please.
>
> A: You can take these and wrap them around someone's neck, even though they broke before you could do anything, even a female, and sometimes females are more fragile than a male. And we have had several incidents in the visiting room where inmates have attacked their female visitors, whether they are pregnant, mothers, sisters, girlfriends, whatever.
>
> Q: [interrupted]
>
> A: We are talking about various different types [of beads]. As I told you, these would probably break, but there are various different types of rosary beads.

App. at 208 (emphasis added).

The above excerpts from the record constitute the only evidence substantiating SCIG's fear that hand-carried rosary beads present a threat to security.

B.

Our reading of the record does not establish that rosary beads are dangerous, or that they present a security risk. The record does not indicate that a string of rosary beads held in a hand is any more dangerous than the prisoner's open hand, which at least arguably could be used to choke a victim or to "palm" a pill smuggled from the outside. Even more significantly, no suggestion has ever been made that rosary beads, which the evidence reveals have been and are consistently permitted to be carried in the general prison population, have ever been deemed to be dangerous or regarded as a weapon. If rosary beads are weapons, as SCIG now contends, then it is difficult to understand why "weapons" such as these

are routinely permitted throughout the prison. Appellee's brief at 13.

Nor does the record explain how contraband can be compressed into the area between the string and beads made of solid wood. The most that can be gleaned from the record is that any legitimate concern which a prison may have with respect to hollowed-out rosary beads which might be considered as a possible receptacle for contraband -- could be readily accommodated by the same type of inspection which takes place with respect to religious medallions which the regulations already permit in the visiting area. App. at 226.

Not only is there no proof in the record to affirmatively establish a legitimate security concern about rosary beads used either as a weapon or to hide contraband, but the evidence points to a

contrary conclusion. Officer Vaughn himself conceded that rosary beads would break apart in any attempt to use them as a weapon. App. at 206-208. And he admitted that never, to his knowledge, had rosary beads or even necklaces been used to smuggle items into or out of the prison. His only qualification was as follows:

> Q: Have you had security problems relating to people wearing religious metals [sic] around their neck?
>
> A: We have had several attempts for inmates to try to bring back different types of chains that they hadn't worn into the visiting room. And vice versa, inmates trying to give the chains to their loved ones.

App. at 226. He admitted that neck chains to which religious medals are attached are at least as useful as weapons (for purposes of strangulation) as rosary beads (assuming that rosary

beads were strong enough to hold together), but acknowledged that neck chains are not prohibited in the visiting area while beads are. App. at 117. He further stated that he could "see no problems with the beads as they lie before me, recognizing what they are, as a praying system, not to be worn, but to be carried." App. at 113.

C.

Moreover, the record establishes that the regulations as they may be applied to the hand-carrying of rosary beads were never intended to serve security goals. Officer Vaughn testified on deposition that the regulation were promulgated to place strict, arbitrary limits on the material possessions that a prisoner could bring with him to the visiting area:

Q: ... is there anything specific about carrying these in the pocket that constitutes a greater threat than what is currently allowed, which is, as I think you have told me, the necklace worn around the neck with a medallion [which is allowed]?

A: Only because we do not allow inmates to carry anything in the visiting room except a wedding band and a religious medallion.

Q: Why not?

A: That's the rule.

Q: Why?

A: Controlling purposes.

Q: Why?

A: If you give them a rosary, next week it will be a wallet, the next week it will be an ink pad.

App. at 119-20.

Officer Vaughn also testified that the decision to prohibit hand-carried beads grew out of his personal feeling, based on consultation with priests, that rosary beads were not essential ["needed"] in a visiting room:

> If I felt that this is something that a person would need in the visiting room when he is visiting with his people, I would say yes, I have no problem with it. But at this time I view it as contraband in the visiting room due to the fact that it is not allowed, and I have information from priests who ...I have consulted with, that this is something that is not needed.

App. at 145 (emphasis added).

In summary, based on this record, the risk of using hand-carried rosary beads either as a weapon or for purposes of concealing contraband has not been established. Thus, unlike the district court, we conclude that the threshold requirement of the Shabazz standard has not been met, because no bona fide security risk occurred or is likely to arise because of the religious practice at issue. Shabazz, 782 F.2d at 714.

IV.

Because SCIG has not demonstrated a "bona fide security problem", we have no need to address the accommodation standard of Shabazz, which would require proof that SCIG has made reasonable efforts to accommodate both Higgins' religious practices and SCIG's security concerns. SCIG having failed to prove any bona fide security concern, no need exists to "accommodate" Higgins' religious practice of carrying rosary beads into the visiting area.

Thus, while we have grave reservations about the state's purported accommodation of Higgins' practice -- particularly in light of Officer Vaughn's testimony that all that would

be required would be to order the next "batch of pants" with a pocket -- App. at 122-23,[2] we find no reason to prolong our discussion with an analysis of free exercise accommodation.

---

[2]Officer Vaughn testified that the solution to the Higgins problem was obvious and not particularly taxing:

> Q: If Mr. Higgins is allowed to carry his rosaries in his pants pocket in the visiting room, how will you respond to that so as to maintain maximum order, security and control?
>
> A: I would probably have to order my next batch of pants with a pocket.
>
> Q: Anything else?
>
> A: There wouldn't be anything else necessary....

V.

Because SCIG has not carried its requisite burden of demonstrating that a bona fide security problem has occurred or is likely to arise because Higgins hand-carried his rosary beads into the visiting area, we will reverse the judgment of the district court and remand for further proceedings consistent with the foregoing opinion.

A. LEON HIGGINBOTHAM, JR., Circuit Judge, dissenting.

When we heard reargument in this case on March 3, 1987, certiorari had been granted in Shabazz v. O'Lone, 782 F.2d 416 (3d Cir.) (in banc) (Hunter, J., joined by Garth, J., dissenting), cert. granted, ____ U.S. ____, 107 S.Ct.

268 (1986) (No. 85-1722). Since then, Shabazz has been argued before the United States Supreme Court. See 55 U.S.L.W. 3616 (U.S. Mar. 24, 1987). I think that we should not decide this matter now, since -- as the majority admits -- "this appeal presents a question ... under the standard announced in Shabazz". Maj. typescript at 2. However, if we are to predicate an opinion on the Shabazz standard, I respectfully dissent from the conclusion that "the record does not establish that rosary beads ... present a security risk." Id. at 8.

This appeal is from a grant of summary judgment. If the majority were merely remanding this matter for a full evidentiary hearing, I would not dissent. But the majority is making findings on what are, at a minimum,

disputed and genuine issues of material fact. While there was probably an absence of disputed material facts sufficient to warrant the entry of summary judgment for the State, there is certainly -- even reading the record in what the majority considers the light most favorable to Higgins -- enough of a dispute to require some further evidentiary hearing on the contraband issue. Given even the majority's view of the facts, in other words, the matter should be remanded to the district court for further findings on a full evidentiary record.

I.

The record in this case establishes that rosary beads typically consist of a string up to two feet long, with wooden beads of varying sizes and an attached

wooden cross of approximately one to three inches in length. Included in the officials' reasons for refusing to allow Higgins to bring his rosary beads with him into the visiting room was the danger that, holled out, the beads could be used to smuggle contraband such as drugs from the visiting area back into the prison. App. at 206-207. Inspecting the beads upon entering and exiting the visiting room, the State maintains, would be both an impracticable and unreasonable burden to place upon its prison guards. Brief for Appellees at 3. The district court agreed that prison officials should not be required to accommodate Higgins' claimed free exercise interest in carrying his rosary beads <u>at all times</u>. "It would be impracticable, unreasonable and too time-consuming to have prison

security dismantle and inspect upwards of fifty individual beads contained in the rosary each time the prisoner enters and exists the visiting room". Higgins v. Burroughs, No. 85-3655, mem. op. at 5 (E.D. Pa. Feb. 26, 1986).

As Higgins points out, statements by prison officials indicate that accommodation of his claim is possible but, from their perspective, undesirable. For example, in his deposition Deputy Vaughn acknowledged that "[i]f I felt that [the rosary] is something that a person would need in the visiting room when he is visiting with his people, I would say yes, I have no problem with it." App. at 145. Higgins also stresses that Deputy Vaughn testified that he would merely order the next batch of prison pants with pockets if a court ordered that Higgins be

allowed to carry his rosary into the visiting area. Id. at 123. From these two statements, Higgins concludes that permitting him to carry his beads into the visiting area "would require no greater measures for the order, security and control at Graterford than what already exists." Brief for Appellant at 6. Higgins contends that, because officials have conceded that accommodation is possible, the first amendment mandates that he be allowed to carry the rosary into the visiting area.

II.

The minimum security plaintiffs in Shabazz were denied all access to the central religious service of their faith even though inmates who were classified

as greater security risks were allowed to attend the weekly Jumu'ah service. In such a situation, we held, officials should be required to show that accommodation would pose a genuine security problem. Shabazz thus articulated a balancing test, which weighs the degree of infringement of a free exercise interest against the degree of risk posed by accommodation, and places the burden on prison officials to demonstrate that no reasonable accommodation exists. We remanded Shabazz so that the district court could determine through additional fact-finding whether the prisoners' free exercise interest reasonably could be accommodated by prison officials without creating an undue security risk. Shabazz, 782 F.2d at 420. We did not decide that accommodation was

constitutionally mandatory. Shabazz held only that security considerations and the feasibility of accommodation must be weighted against the claimed infringement of free exercise rights. Id.

Prision officials already have accommodated Higgins's religious beliefs to a significant degree. He is permitted to carry his rosary beads throughout the prison, and only during the few hours he spends in the visiting area -- some three or four times per year -- is he forbidden to carry the beads. This amounts to less than ten out of approximately 8,760 hours per year.

The State's security concerns focus on the dangers of contraband storage. Deputy Vaughn testified that "the beads themselves could be altered and it could

be the form of a tablet or pill or anything." App. at 207. He further testified that "we have found things hidden under stamps.... [Y]ou would be surprised how some things very small items are tried to be smuggled in .... I wouldn't put anything past anybody from trying to put something in the holes.' Id. at 222. I am persuaded that, even if the district court improperly concluded that summary judgment for the State was warranted, whether this contraband risk outweighs Higgins's free exercise right should be reconsidered by the district court, assisted by further findings.

III.

Because Higgins's religious beliefs already have been substantially accommodated, and because valid security

considerations appear to militate against creating this cumbersome exception to the State's visiting area regulations, I decline to intrude into the province of the state penological system on the record before us at this time. For the foregoing reasons, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

WILLIAM F. HIGGINS	:	CIVIL ACTION
v.	:	
J. BURROUGHS, et al	:	NO. 85-3655

MEMORANDUM OPINION AND ORDER

WEINER, J. February 26, 1986

Plaintiff, a prisoner incarcerated at the State Correctional Institution at Graterford (SCIG), brought this civil rights action against defendants alleging a violation of his Constitutional rights. Presently before the court are cross-motions for summary judgment. For the reasons which follow, plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted.

Plaintiff claims that his First Amendment right to exercise his religion was abridged when defendant prison officials prohibited him from carrying his rosary beads into SCIG's visiting room. Plaintiff claims violation of his rights under 42 U.S.C. §1983.

To prevail upon a motion for summary judgment the moving party must conclusively demonstrate to the court's satisfaction that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law, Fed.R.Civ.P. 56(c); Wolk v. Saks Fifth Avenue, Inc., 728 F.2d 221, 224 (3d Cir. 1984); Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983). We must view all disputed facts in the light most favorable to the party opposing the motion. EEOC v. Great Atlantic & Pacific Tea Co., 735 F.2d 69,

81 (3d Cir. 1984); Small v. Seldows Stationery, 617 F.2d 992, 994 (3d Cir. 1980). There are no disputes as to material facts.

An action under 42 U.S.C. §1983 requires (1) the conduct complained of must be committed by a person acting under color of state law, and (2) it must have deprived the plaintiff of a right or privilege secured by the Constitution or the laws of the United States. Parrat v. Taylor, 451 U.S. 527, 535 (1981); Riley v. Jeffes, 777 F.2d 143, 145 (3d Cir. 1985). The federal courts have a delicate role in the complex matters pertaining to the administration, control, and operation by the states of their penal systems and their prisons, an area traditionally within their domain. Riley at 145. Federal courts have consistently held

that restrictions on a prisoner's constitutional rights must be evaluated in terms of the legitimate goals and policies of the penological institution. Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoner's Labor Union, 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974); St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980). "Convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." Bell at 545. Nevertheless, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Id. at 545-46. Thus, "even when an institutional restriction infringes a specific constitutional guarantee... the

practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." Id. at 547. "Prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Id. at 547. "[J]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." Id. at 548.

In the case sub judice, it is the policy of SCIG to only allow inmates to wear wedding bands, glasses and approved religious medals in the visiting area in order to maintain order, security and control. The Bureau of Corrections Administrative Directive 819 and the Inmate Handbook define an approved medal as a religious medal worn by the inmate which does not exceed the size of a fifty cent piece. Defendant claims that the rosary beads could be used to hide contraband such as a tablet or a pill. Defendant also argues that the rosary beads can be used as a weapon by wrapping them around someone's neck in the visiting area. Prison guards would be burdened with the difficulty of (1) determining what artifacts are truly rosary beads and (2) maintaining surveillance over a variety of sized and

shaped rosary beads to ensure that they are not being used for illicit purposes.

Most important, a prison's visiting area has the potential for most security, order and control problems than any other area in the prison, by the very nature of the fact that inmates have outside contact with visitors in the visiting area. Only through uniform enforcement of the visiting area regulations can SCIG maintain order and control.

The plaintiff is not barred from seeking declaratory relief, however, as the standard articulated by the United States Court of Appeals for the Third Circuit is that the burden of proof lies with the prison officials to show that the inmate's exercise of his First Amendment rights could create a

potential threat to either the prison's order, security or control. St. Claire v. Cuyler, 634 F.2d at 114. The Court of Appeals has since modified St. Claire in Shabazz v. O'Lone, (3d Cir., No. 84-5772) (filed January 27, 1986). In Shabazz, plaintiffs were deprived of attending Jumu'ah, a religious service which is held only on Fridays at noon. The correctional policy effectively banned the inmates' once a week opportunity to attend the service. The Court of Appeals held that when an inmate challenges, in a civil rights action, certain prison regulations as violative of his amendment rights, "the state must show that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which appellant's

religious rights can be accommodated without creating bona fide security problems." Shabazz, slip op. at 9.

The case sub judice is distinguishable from Shabazz in that this plaintiff can carry his rosary beads anywhere in the prison, except the visiting area. His religious exercise of carrying the rosary beads has not been totally banned as was the case in Shabazz. Even if the ruling in Shabazz is applicable to this case, all that is needed is "reasonable methods of accommodation... without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights." Shabazz, slip op. at 10.

Plaintiff has been afforded reasonable methods of accommodation since it has been established that he

can carry his rosary beads through the prison, except in the visiting area. It would be impracticable, unreasonable and too time-consuming to have prison security dismantle and inspect upwards of fifty individual beads contained in the rosary each time the prisoner enters and exists the visiting room.

The defendants have articulated valid security, control and order reasons why plaintiff should not carry his rosary beads into the visiting area of the prison, and have reasonably accommodated his First Amendment rights by allowing him to carry them everywhere else. He could also wear them around his neck or on his person as all other inmates are allowed to do regarding the various types of religious and other medals and chains that they wear.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

WILLIAM F. HIGGINS	:	CIVIL ACTION
v.	:	
J. BURROUGHS, et al	:	NO. 85-3655

ORDER

FEBRUARY 26, 1986

The motion of the plaintiff for summary judgment is DENIED.

The motion of the defendant for summary judgment is GRANTED.

Judgment is entered in favor of the defendant and against the plaintiff.

IT IS SO ORDERED.

Charles R. Weiner

Supreme Court, U.S.
FILED
AUG 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-8

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

J. BURROUGHS, LIEUTENANT DIETRICK, PASQUALE BARONE, CHARLES H. ZIMMERMAN,

Petitioners

v.

WILLIAM F. HIGGINS,

Respondent

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ARGUMENT

In the petition for writ of certiorari, we presented to the Court the reasons why the Court of Appeals' standard for the accommodation of the religious rights of prisoners conflicts with decisions of this Court -- most notably, the recent decisions in O'Lone v. Estate of Shabazz, No. 85-1722 (June 9, 1987), and Turner v. Safley, No. 85-1384 (June 1, 1987). In opposition to the petition, respondent takes the remarkable position that the Court of Appeals' decision does not conflict with O'Lone, even though the Court of Appeals expressly based its decision in this case on its own prior decision in O'Lone, which now has been rejected categorically by this Court.

Apparently, respondent would read this Court's decision in O'Lone as not incongruous with the Court of Appeals' decision in this case for two reasons: 1) the burden placed upon government officials by the Court of Appeals here is not different from the burden placed by this Court in O'Lone, and 2) the Court of Appeals here never reached the accommodation issue discussed in O'Lone. Respondent simply is wrong on both counts.

While it is true that the Court of Appeals did not expressly resolve the accommodation issue, it stated it had "grave reservations about the state's purported accommodation of Higgins' practice." (App. 21a) As we pointed out in the petition, however, these "reservations" run counter to the District Court's express findings of reasonable

methods of accommodation having been afforded to respondent (App. 41a-42a), and therefore must be re-examined under this Court's decision in O'Lone.

More significantly, however, under the Court of Appeals' standard, prison officials had the burden of establishing that their security concerns were based upon actual incidents of problems with the challenged prison policy. Shabazz v. O'Lone, 782 F.2d 416, 419-20 (3d Cir. 1986), rev'd sub nom. O'Lone v. Estate of Shabazz, No 85-1722 (June 9, 1987). Such a standard, as this Court has made clear, ignores the Court's directions that corrections officials must be permitted to forestall threats to security before problems actually occur. O'Lone, slip op. at 6. There is a difference between

identifying a bona fide concern and pointing to an actual incident. Thus, respondent cannot plausibly argue that the standard reiterated by this Court in O'Lone -- that a regulation need only have a logical connection to a legitimate governmental purpose -- is "virtually identical" to the now-discredited Third Circuit standard. (Resp. Br. p. 6) Identifying the logical connection is precisely what the Court of Appeals decided was insufficient but which this Court found to be proper in O'Lone.

CONCLUSION

For these reasons, and the reasons expressed in the petition for writ of certiorari, the petition should be granted and the decision of the Court of Appeals should be reversed summarily.

Respectfully submitted,

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